

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

<b>800 RIVER ROAD OPERATING COMPANY, LLC d/b/a WOODCREST HEALTH CARE CENTER</b>  <b>Employer</b>	<b>NLRB Case No: 22-RC-073078</b>
<b>and</b>  <b>1199 SEIU, UNITED HEALTHCARE WORKERS EAST</b>  <b>Petitioner</b>	

**EMPLOYER’S EXCEPTIONS TO THE HEARING  
OFFICER’S REPORT ON OBJECTIONS**

Comes now the Employer, 800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center (“Employer”) and hereby files the following Exceptions to Hearing Officer Eric Pomianowski’s June 4, 2012 Report on Objections (“Report”). The rationale and legal precedent supporting the Employer’s Exceptions are set forth in the accompanying Brief.

The Employer excepts to the Report’s findings, omissions, and recommendations as follows:

1. The Hearing Officer’s finding that the 10-day adjournment that postponed the beginning of the trial was a period during which the Employer could or should have interviewed employee witnesses (Report at 4).
2. The Hearing Officer’s finding that “none of the witnesses presented by the Employer provided any testimony of first-hand factual knowledge of facts surrounding the alleged objectionable conduct” (Report at 4).

3. The Hearing Officer's failure to acknowledge that the central element of the Employer's complaint that it was denied due process, and its consequent refusal to proceed with the hearing, arose out of the Hearing Officer's refusal to issue 6 subpoenas that the Employer had requested during the lunch break on the second day of the hearing, not merely the Hearing Officer's insistence that the Employer present witnesses with first-hand knowledge of objectionable conduct before any other evidence was adduced (Report at 4). The omission from the Report of any reference to the subpoena issue includes the following:
  - a. The Hearing Officer's failure to issue the requested subpoenas in violation of the National Labor Relations Act, the Board's Rules and Regulations, and the Due Process Clause of the Fifth Amendment to the United States Constitution
  - b. The Hearing Officer's failure to issue the requested subpoenas *ex parte* as the Board's Rules and Regulations provide.
  - c. The Hearing Officer's failure to find that Vergel de Dios told his staff what to say if anyone asked them about Vergel de Dios' statements to them during the campaign.
  - d. The failure of the Hearing Officer to acknowledge that as a result of nos. 3, 3(a), 3(b), and 3(c) it has precluded the Employer from serving the subpoenas without Vergel de Dios becoming aware that it has done so and thereby foreclosed the Employer from being able to secure testimony from the employees it would have subpoenaed without interference by Vergel de Dios.
4. The Hearing Officer's finding "that counsel was using the hearing to investigate the objectionable conduct rather than to present an affirmative case" (Report at 5).
5. The Hearing Officer's finding that "the Employer provided no witnesses with direct knowledge of evidence which would establish the allegations raised in its objections" (Report at 6).

6. The Hearing Officer's finding that (a) examination of witnesses directed at establishing hostility and absence of credibility was unnecessary, (b) there was no factual foundation for the examination of witnesses that was conducted, and (c) the issues about which the Employer questioned witnesses were tangential (Report at 6).
7. The Hearing Officer's finding that the testimony of the witnesses "went far afield" and that he allowed "Employer counsel much leeway" (Report at 6 n.1).
  - a. The Hearing Officer's failure to acknowledge that he rejected the Employer's request that he deem Loesha Chase, Israel de Vergel de Dios, Janet Lewis, Jane Cordero, Clarice Gogia, Katherine Frost, Remy Sajimi, and Bonita Thornton adverse or hostile witnesses.
  - b. The Hearing Officer's failure to acknowledge that he rejected the Employer's request that it be permitted to question the above-named witnesses utilizing leading questions.
  - c. The Hearing Officer's failure to acknowledge that to the extent he permitted leading questions belatedly, he unduly prejudiced the Employer because it had proceeded with witness examinations to a point at which the witnesses had already deeply advanced their testimony, rendering belated asking of leading questions useless or far less useful than would have been the case had the Employer been able to use them initially.
8. The Hearing Officer's failure to acknowledge that supervisor Israel Vergel de Dios' testimony was riddled with inconsistencies and dissembling, as detailed in the Employer's supporting Brief, and that Vergel de Dios acknowledged (a) conveying to employees other than the Employer's "vote no" message after initially insisting that he had only campaigned as the Employer wanted and (b) telling employees what to say in the event they were asked about his campaign conduct after initially denying that he had told anyone what they should say (Report at 7).
9. The Hearing Officer's finding that former Director of Nursing Clarice Gogia testified that she last worked for the Employer in June 2012 (Report at 9).

10. The Hearing Officer's finding that Israel de Dios' testimony should be credited (Report at 10).
11. The Hearing Officer's finding that Israel de Dios' testimony consisted largely of hearsay and his related failure to find that Israel de Dios' testimony was evasive and unresponsive to the examination (Report at 11).
12. The Hearing Officer's finding that the Employer was given ample opportunity to present direct factual testimony insofar as that statement is intended to encompass the examination of Israel de Dios (Report at 11).
13. The Hearing Officer's finding that one would have to speculate about the Employer's tactical decision to withhold its strongest witnesses insofar as the Employer explained its rationale for proceeding as it did (Report at 11).
14. The Hearing Officer's conclusions that (a) no substantial or material issues affecting the result of the election were raised with respect to Objection Nos. 1 and 2, (b) no objectionable conduct was committed, and (c) the Board should overrule Objection Nos. 1 and 2 (Report at 11).

Respectfully submitted,

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Dated: June 26, 2012

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 26th day of June 2012, the foregoing Employer's  
Exceptions to Report of Hearing Officer was served on:

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**EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS**

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## PRELIMINARY STATEMENT

This is a case in which the Board must reject the recommendation of the Hearing Officer and order a rerun election. The Hearing Officer trampled upon the Employer's rights and denied it due process. First he forced the Employer to declare on the record why it required six subpoenas and then he refused to issue the subpoenas in contravention of the National Labor Relations Act and the Board's Rules and Regulations. Not only did the Hearing Officer deny the Employer the tool it needed for securing necessary testimony, but it stripped from the Employer the element of surprise that, given record evidence of obstruction by a key witness, was necessary for the Employer to make its case.

At the hearing, the Employer's Director of Environmental Services, Israel Vergel de Dios, was evasive and untruthful. Rather than respond directly to questions put to him regarding a conflict that arose between himself and another manager over the condition and cleanliness of the facility--and this conflict is what caused Vergel de Dios to tell members of his staff that they should vote for the Union---he fenced with Employer counsel and dissembled. When it had become apparent, following his examination, that Vergel de Dios was unwilling to be forthright under oath about the conflict with that manager, that he had encouraged members of his staff to support and vote for the Union, and that he had spoken with members of his staff to "cover up" the considerable influence he had wielded over them, the Employer made an *ex parte* request of the Hearing Officer that he issue it six subpoenas for service upon members of Vergel de Dios' staff. The Hearing Officer violated the Employer's statutory rights and right to due process under the Fifth Amendment by insisting that the Employer state on the record why it wanted the subpoenas and then declining to issue the requested subpoenas. Because the Hearing Officer's actions were so prejudicial, the Employer refused to proceed at the hearing and the case concluded on an incomplete record. In view of how central the Hearing Officer's refusal to issue

the requested subpoenas was to the Employer's refusal to proceed with the hearing, the June 4, 2012 Report On Objections ("Report") is shocking in that it fails to mention, let alone address, the dispute over the subpoenas. This omission of any mention of the most crucial event of the hearing necessitates rejection of the Hearing Officer's recommendations.

Since record evidence indicates that Vergel de Dios engaged in a "cover up" by telling his staff what to say about his campaign conduct and the Hearing Officer compelled the Employer to state on the record the purpose of the subpoenas, a decision to return the case to the Region for resumption of the hearing and issuance of subpoenas will not put the Employer in the position it would have been in had the Hearing Officer issued the requested subpoenas in the first place. The Employer will be unable to proceed with subpoenas "under the radar" as it had hoped and elicit necessary, truthful testimony from Vergel de Dios' staff as it would have had the subpoenas initially been issued *ex parte*. Accordingly, the only remedy that will place the Employer in the position that it should have been in is an Order from the Board directing a rerun election.

## **BACKGROUND AND FACTS**

### **I. Procedural Background**

On January 23, 2012, 1199 SEIU, United Healthcare Workers East ("Union") filed a petition seeking a representation election among certain employees of 800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center ("Employer" or "Center"). The parties executed a Stipulation that, among other things, set an election date of March 9, 2012 and excluded supervisors from the election unit. Among the supervisors excluded from the unit were two LPNs who are part-time supervisors responsible for managing the Center on certain shifts.

The election was held on March 9, 2012 in which 122 ballots were cast for the Union, 81 were cast against the Union, and two were challenged. On March 16, 2012, the Employer filed

timely objections to the conduct of the election. On April 17, 2012, the Region issued a Report on Objections and Notice of Hearing that ordered that the parties put on evidence at a hearing concerning Objections 1 and 2. The Region overruled Objections 3 through 12, and exceptions that the Employer timely filed with respect to those objections are presently pending before the Board. The hearing that the Region ordered with respect to Objections 1 and 2 began on Thursday, May 10, continued on Friday, May 11, and terminated on Monday, May 14.<sup>1</sup>

Objection 1 alleged that supervisors were involved in the solicitation of union authorization cards and that such conduct coerced employees in the exercise of their free choice and thereby interfered with the election. Objection 2 alleged that supervisors engaged in pro-union conduct that also coerced employees in the exercise of their free choice and also thereby interfered with the election.

Objection 5, which the Region overruled, alleged that the Union offered monetary rewards in exchange for votes in favor of the Union and created the impression that voters would receive monetary rewards for voting “yes”. The underpinning for this objection was the Union joining openly with discharged former Center managers David Repoli and Clarice Gogia, who while employed by the Center had operated personal businesses out of the Center that had profited voters who worked for the Employer. Although the Employer was not entitled to adduce evidence going to the merits of Objection 5 at the hearing, based upon its post-election investigation the Employer had reason to believe that Repoli and Gogia, as well as another discharged former manager named Katherine Frost, had knowledge of what transpired during the election campaign and would be able to testify about supervisory pro-union conduct (i.e.,

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<sup>1</sup> The hearing had been scheduled to begin on Tuesday, May 1. However, on April 30, the New Jersey Department of Health commenced a survey of the Center. The Employer requested an adjournment since most, if not all, its personnel needed to focus their efforts upon the survey. The Board granted the requested adjournment until May 10. Contrary to the finding of the Hearing Officer (Report at 4) and consistent with the purpose of the adjournment, the Employer did not utilize this time to interview election unit personnel in preparation for the hearing.

Objections 1 and 2). Because the Center was adverse to Repoli, Gogia, and Frost in a civil lawsuit that it brought against them, its contact with them regarding their potential testimony prior to the hearing was restricted and it subpoenaed them to testify at the hearing.

## **II. The Objections Hearing**

On May 10, the first day of hearing, two of the supervisors who the Employer alleged had engaged in pro-union conduct testified. Janet Lewis denied that she had engaged in any pro-union conduct (Tr. 157:13-158:4; 165:24-166:6). Israel Vergel de Dios, who as Director of Environmental Services supervised porters, laundry aides, and housekeepers (Tr. 51:3-4), denied that he had engaged in any pro-union conduct (Tr. 94:25-95:1; 114:13-16). However, Vergel de Dios was evasive and untruthful throughout his testimony. He denied having become angry or having had a disagreement with a manager from outside the Center, Jason Gibbs, when Gibbs inspected the facility and reviewed the performance of Vergel de Dios' department on the Friday and Monday preceding the election (Tr. 62:24-63:3; 75:12-77:16). This denial was crucial since these episodes prompted Vergel de Dios to speak to his staff in favor of the Union in the days immediately before the election. Careful review of the record shows that Vergel de Dios' testimony that he had not had a problem with Gibbs and that he had not become angry as a result of that review was inconsistent, uncertain, and unpersuasive. Among other things, Vergel de Dios fended with Employer counsel, asserting that his belated admission that Gibbs had "upset" him (Tr. 110:13-20) differed from him becoming "angry" about Gibbs' review and criticisms (Tr. 81:24-83:22). Notably, Vergel de Dios ultimately conceded that he had become "upset" when talking about Gibbs' oversight with then-Administrator Senk (Tr. 83:25-84:3).

Significantly, toward the very end of his testimony, Vergel de Dios reluctantly and begrudgingly admitted that he had told at least one member of his staff that if the staff member wasn't convinced that he should reject the Union, how he voted "was up to [him]" (Tr. 114:14-

22) . Vergel de Dios followed that acknowledgement by testifying that he told at least one other member of his staff that if the staff member wasn't sure how the Union's health insurance program matched up with what he had at a unionized job, he needed to "find out whether this is the same union" as there (Tr. 112:25-113:2). In view of how emphatically Vergel de Dios had previously insisted that he had campaigned on behalf of the Employer, these admissions are striking. However, on a record in which Vergel de Dios' testimony was so begrudging and incomplete, these admissions appeared to be just the tip of the iceberg. Given that Vergel de Dios controlled much, if not all, of his staff (Tr. 62:16-23; 117:7-22) and was positioned to deliver their votes to the Union, the Employer should have been afforded the latitude to subpoena and examine his staff.

Indeed, Vergel de Dios was extremely contentious during his examination, repeatedly argued with Employer counsel (Tr. 79:24-80:1; 81:22-83:4), and interrupted Employer counsel during colloquy between the attorneys as if he was part of their back-and-forth rather than a fact witness (Tr. 91:24-92:6; 93:7-95:5; 95:11-19; 98:2 and 6). Illustrative of Vergel de Dios' arrogance as a witness as well as the chaos that marred his examination is the fact that while Vergel de Dios was testifying his cell phone rang and he answered it (Tr. 77:12-22).

Critically, Vergel de Dios testified inconsistently about what he told his staff to say if asked about his discussions with them concerning the Union during the campaign. After repeatedly denying that he said anything to his staff about what they should say if asked about his campaign conduct (Tr. 103:8-103:18), he admitted that he spoke with them about this (Tr. 103:19-104:9). He then testified as if every member of his staff had communicated his or her support for him (Tr. 94:25; 98:22-99:1; 99:14-15; 101:19-25), hard as it is to believe (as he claimed) that their focus was on why Vergel de Dios had been subpoenaed and they had not been

(Tr. 101:10-25). Then, in virtually the next breath, he testified that he had only spoken with two or three members of his staff (Tr. 104:10-12).

Vergel de Dios also purposefully and misleadingly denied that he had attended a meeting of department heads, unconvincingly pretending at first that he did not know what meeting Employer counsel was referencing (Tr. 96:1-99:15). Vergel de Dios was evasive precisely because he had walked into that meeting and, as Senk testified thereafter, volunteered without provocation or cause that he had been subpoenaed to appear at the objections hearing “but I don’t have anything to worry about” because he had spoken to his entire staff and “my employees have my back” (Tr. 207:1-17 [Senk]; cf. Tr. 99:14-15; 103:12-13; 104:1-3 [Vergel de Dios]). Vergel de Dios begrudgingly agreed that he had attended the meeting (pretending that uncertainty over the day it took place was what had confused him)(Tr. 101:4-9), but never actually answered Employer counsel’s question regarding what he said at the meeting: he testified only to what members of his staff would say if asked what he had told them (Tr. 102:1-23). Employer counsel was unable to pursue this line of examination exhaustively as Union counsel interfered with his examination and the Hearing Officer failed to supervise the proceeding properly, permitting Vergel de Dios to evade this line of questioning (Tr. 96:1-105:22).<sup>2</sup>

Vergel de Dios contradicted himself several times during his examination and, despite the conclusions set forth in the Report, plainly aroused the Hearing Officer’s suspicions and concern precisely because it was apparent that he was dissembling and not testifying forthrightly (Tr. 83:8-15; 96:19). A complete review of Vergel de Dios’ testimony establishes beyond the

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<sup>2</sup> Until the Hearing Officer directed that the Employer only call witnesses who it had interviewed and could provide non-hearsay testimony going to the merits of Objections 1 and 2, the Employer was considering whether to call one or more department heads to corroborate Senk’s testimony that Vergel de Dios had told the other department heads that his staff “have his back”. Prior to trial, the Employer had not expected to have to develop the record in this respect since it had not anticipated Vergel de Dios obfuscating about the department head meeting. The Hearing Officer’s hijacking of the Employer’s trial strategy prevented the Employer from making the record it intended.

shadow of a doubt that he was evasive; often failed to respond directly to the questions put to him on direct examination; and that the combination of the Union's disruptive objections, Vergel de Dios' digressive responses, and the Hearing Officer's refusal to permit leading questions and to control the proceeding while Vergel de Dios testified interfered with the Employer's ability to make a full record in connection with Vergel de Dios' appearance.

Notably, Vergel de Dios testified that he supervised 24 voters, which was a number sufficient to change the outcome of the election. From the time the petition was filed through the election, Vergel de Dios supervised 22 active employees; two employees in his department were on disability (Tr. 51:15-16; 61:5-9 [and Employer Exhibit 2]; 61:14-18 [and Employer Exhibit 3]; 104:7-9).<sup>3</sup>

Then-Administrator Lori Senk's testimony established, among other things, that for no apparent reason Vergel de Dios volunteered to a meeting of department heads that he had nothing to worry about because his staff "had his back". This testimony directly refuted Vergel de Dios' ever-shifting and uncertain version of events.

The other two supervisors who the Employer alleged had engaged in pro-union conduct also testified on May 11. Both Jane Cordero and Bonita Thornton, the part-time supervisor LPNs referenced above, denied that they had engaged in any pro-union supervisory conduct (Tr. 267:13-20; 271:6-8; 378:15-23; 381:10-14; 382:1-11; 383:4-6). Remi Sajimi, an employee witness who had refused to speak with the Employer during its post-election investigation but whom the Employer believed had supported the Union and was likely to have knowledge of

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<sup>3</sup> In *Harborside Healthcare, Inc.*, 343 NLRB 906, 913 n. 23 (2004), the Board held that "unopened, uncounted challenged ballots" should be counted as if they "were cast in favor of the objecting party" in determining whether the conduct in issue materially affected the outcome of the election. Accordingly, in this case, the 2 challenged ballots are subtracted from the 41 vote difference, leaving a margin of 39 votes. That margin translates into 20 voters. Since Vergel de Dios supervised 24 employees, the employees under his direction were an outcome – determinative group.

supervisory pro-union conduct, also testified that day. She denied that Jane Cordero had told her that Cordero would make sure several employees attended a Union meeting, as night supervisor Susan Langan had heard and informed Employer counsel (Tr. 363:9-13). Gogia and Frost, two former Center managers who the Employer had not spoken with as a result of the pendency of a lawsuit the Employer had brought against them, also testified that they had no knowledge of pro-union supervisory conduct (Tr. 298:9-299:13; 322:9-21).<sup>4</sup> Cartney Ezyk, the Center's Admissions Director, also briefly testified.

During the lunch break on the second day of hearing, Employer counsel requested an *ex parte* meeting with the Hearing Officer for the purpose of requesting six subpoenas. During that meeting, the Hearing Officer engaged Employer counsel in an extensive off-the-record dialogue and challenged the Employer's right to the requested subpoenas on the ground that after approximately a day and one-half of hearing the Employer had not adduced non-hearsay testimony in support of Objections 1 and 2. Employer counsel defended the Employer's litigation strategy, pointing out as he had on the record the difficulties inherent in proving supervisory pro-union conduct. Faced with the prospect that the Hearing Officer would not issue the requested subpoenas and as a result of the Hearing Officer's insistence that the Employer explain the necessity of the requested subpoenas, Employer counsel was compelled to identify the group of employees that the Employer intended to subpoena and to explain the reason for doing so. After approximately twenty minutes, Union counsel joined the discussion. Much, if

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<sup>4</sup> Loesha Chase, an independent contractor formerly engaged by a resident of the Center who is related to Gogia and employed by Gogia's business (Tr. 15:3-16:11; 17: 16-20), testified under subpoena as well. Employer counsel had not spoken with Chase prior to the hearing as a result of adversarial relations between Chase and the Employer resulting from the Employer banishing Chase from the Center. Chase denied the Employer's contention that she had knowledge of pro-union supervisory conduct as a result of her shifts worked at the Center working for Gogia's company during the organizing drive (Tr. 41:21-24).

not all, of the above was repeated in his presence. The parties then went back on the record and stated their respective positions.

The Hearing Officer directed the Employer to make an offer of proof as to non-hearsay witness testimony it expected to elicit as part of its direct case in support of Objections 1 and 2 (Tr. 338:4-9). Employer counsel did so with respect to employees who it had interviewed during its post-election investigation and/or in preparation for the hearing (Tr. 341:24-342:1; 345:2-10). However, Employer counsel could not do so for several witnesses that it had already subpoenaed, one of whom (Mirline Bazile) was present at that time to testify (Tr. 345:11-346:11; 346:13-347:16; 350:17-351:19). Like Remi Sajimi (referenced on the previous page), these were employees who the Employer believed had supported the Union and were likely to know about pro-union supervisory conduct but with whom the Employer had not spoken because they had exercised their rights under *Johnnie's Poultry* and declined to be interviewed. At that juncture, because the Employer could not make an offer of proof as to the expected substance of the testimony of those witnesses, the Hearing Officer directed the Employer to dismiss the witness who was present and to refrain from calling others who were similarly situated (Tr. 347:18-21; 357:7-358:9; 383:19-20; 384:10-21; 385:1-17). The Employer objected, to no avail, that in view of the hurdles that were inherent in it proving supervisory pro-union conduct the Hearing Officer was improperly handicapping and prejudicing it.

In making its offer of proof (Tr. 351:20-357:5), the Employer refused to identify by name the witnesses that it intended to call who it understood would provide non-hearsay or other probative testimony. The Employer represented that there was a campaign of intimidation underway at the Center that was deterring employees with knowledge favorable to the Employer's position from appearing as witnesses (Tr. 349:9-16; 349:23-350:2). In fact, then-

Administrator Senk had received several death threats after the Employer had filed objections to the election (Tr. 186:12-15 [comment made during colloquy by Employer counsel]). Accordingly, the Employer took the position that at that moment it would be imprudent for it to name the employees that it expected would be willing to appear on the next hearing date. Notably, during the hearing Employer counsel attempted to question witnesses about such intimidation, but the Hearing Officer sustained Union objections to such questions and thereby prevented the Employer from developing the record in that respect (Tr. 366:20-369:3; 375:13-376:25).

Finally, the Hearing Officer compelled the Employer to identify the group of employees that it believed it had to subpoena in view of Vergel de Dios' testimony and to state the reason it required the six subpoenas that it had sought (Tr. 338:19-339:24). In response to the Hearing Officer's question whether the Employer had interviewed these employees, Employer counsel noted that most of the employees in Vergel de Dios' department with whom counsel had attempted to speak had declined to interview with counsel (stating that they had to talk to Vergel de Dios first) and that in the end counsel had spoken with either few or none of the employees that it intended to subpoena (Tr. 338:19-339:2; 339:18-23; 341:6-13; 342:4-343:4). The Hearing Officer then did what he had indicated he would do when he had conducted his extensive off-the-record discussion with counsel, denying the Employer's request for the subpoenas (Tr. 383:21-384:8). Incredibly, as noted below, the Report **omits any reference to the extensive off-the-record discussion or the on-the-record colloquy that resulted in denial of the Employer's subpoena request.**

On May 14, the third day of hearing, the Employer did not call any witnesses. Employer counsel stated on the record that after reflecting upon the Hearing Officer's refusal to

issue the subpoenas that the Employer had requested, let alone issue them *ex parte*, the Employer had concluded that the Hearing Officer had hopelessly and irrevocably compromised the Employer's ability to prove the objections and it saw no point in subjecting the employees whose testimony was the subject of the offer of proof to intimidation and harassment (Tr. 392:23-396:2; 396:21-20; 401:14-405:8; 406:15-412:16; 413:13-24). Accordingly, the Employer did not produce those witnesses at the hearing, explained why it was not producing those witnesses and was withdrawing from the hearing on an incomplete record, and reserved its right to continue to prosecute its objections on the existing record in view of the Hearing Officer's erroneous and prejudicial rulings.

### **III. The Defects In The Hearing Officer's Report And Conduct Of The Hearing.**

The Hearing Officer concluded that the Employer did not prove that the objectionable conduct it had alleged had occurred. However, the Hearing Officer reached that conclusion prematurely and erroneously--exceeding his power, improperly interfering with the Employer's presentation of its case, and violating the Employer's rights under the statute, the Board's Rules and Regulations, and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Most critically, the Hearing Officer refused to issue subpoenas that the Employer requested *ex parte* as permitted under the Board's Rules and Regulations. Issuance of the subpoenas became a necessity following (1) the highly-charged examination of department head Israel Vergel de Dios in which he unconvincingly denied having told his staff not just to support the Union but what to say if asked whether he had engaged in pro-union conduct during the election campaign and (2) testimony by then-Center Administrator Lori Senk that at a meeting of department heads she attended, Vergel de Dios had volunteered that he had spoken with his staff and had "nothing to worry about" (an odd choice of words, she thought) because "they had his

back”. The Hearing Officer’s refusal to issue the subpoenas, let alone do so *ex parte*, was prejudicial in view of the fact that Vergel de Dios held considerable sway, if not outright control, over substantial portions of his staff. Given that Vergel de Dios told members of his staff what to say if asked what he had said during the campaign, the only chance the Employer had of securing truthful testimony from Vergel de Dios’ subordinates was to subpoena those employees “under the radar” (i.e., without Vergel de Dios becoming aware that it was doing so).

Given the Report’s silence, the Hearing Officer apparently concluded that Vergel de Dios’ testimony about his remark he made at the meeting of the department heads does not mean that he told members of his staff what to say about his conduct during the campaign. Based upon what Vergel de Dios stated at the meeting of the department heads, Senk understood otherwise and directly refuted Vergel de Dios’ inconsistent and wavering story. The Hearing Officer improperly and unfairly engendered his erroneous conclusion by preventing the Employer from utilizing leading questions in examining Vergel de Dios. The Employer repeatedly requested the right to utilize leading questions consistent with Rule 611(c), Fed.R.Evid., and was denied that right notwithstanding clear and unequivocal resistance and hostility by Vergel de Dios (Tr. 82:4-16; 84:4-95:23; 98:1-13) as well as other witnesses (Tr. 19:19-20:7; 22:22-23:6; 36:19-37:9 [Loesha Chase]; 326:18-329:7 [Frost]). Ultimately, the Hearing Officer’s Report is deficient, above and beyond what has been stated so far, in view of the utter absence of any acknowledgement that the principal reason the Employer withdrew from the hearing was the Hearing Officer’s unlawful refusal to issue the subpoenas that the Employer requested, let alone issue them *ex parte*. The Report focuses upon the asserted absence of non-hearsay evidence in support of the Employer’s objections. However, as the Employer repeatedly insisted during the hearing, it was entitled to present its case as it saw fit tactically, especially in view of the fact that

allegations of pro-union supervisory conduct are inherently difficult to prove. A supervisor who has engaged in such conduct is reluctant to testify truthfully because admission of the conduct alleged is an acknowledgement that he has violated his duty of loyalty, which would entitle the employer to discharge him. In such circumstances, the hurdles that the Employer faces in proving such objections are significant and the Hearing Officer should permit the Employer substantial leeway. While the Hearing Officer here believed that he did so (Report at 6 n. 4), the record makes clear that he did not and that he violated the Employer's statutory and due process rights. The absence of any acknowledgement in the Report that the Employer's withdrawal from the hearing grew out of the Hearing Officer's handling of the subpoena dispute and refusal to issue the subpoenas is itself a basis for reversal since the Board should be transparent and forthright, rather than evasive and intellectually dishonest, in its decision making.

### **ARGUMENT**

#### **The Hearing Officer Violated The National Labor Relations Act, The Board's Rules And Regulations, And The Employer's Right To Due Process By Refusing To Issue The Requested Subpoenas On An *Ex Parte* Basis.**

##### **I. The Employer Had A Right To The Requested Subpoenas Under The Statute And The Board's Rules And Regulations.**

Under § 11(l) of the National Labor Relations Act, the Hearing Officer was obligated to issue the requested subpoenas when the Employer asked for them. That provision clearly and specifically provides that "the Board...**shall** upon application of any party..., **forthwith** issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested". 29 U.S.C. § 161(l) (emphasis added). The Supreme Court of the United States has held that the Board's "issuance of subpoenas is mandatory" and that when they are requested "the subordinate official automatically issues the subpoena to the applicant" because there is "no delegation...entailing the

exercise of discretion”. *Lewis v. NLRB*, 357 U.S. 10, 14-15 (1958). Accordingly, by its plain terms, the statute required the Hearing Officer to issue the requested subpoenas.

The Board’s Rules and Regulations reflect, as they should, the above-referenced statutory mandate. Section 101.20(c) provides that at a representation hearing such as that held here “the primary interest of the Board’s agents is to ensure that the record contains as **full a statement of the pertinent facts** as may be necessary for determination of the case” (emphasis added). The provision continues by stating that “[t]he parties are afforded **full opportunity** to present their respective positions” and “to produce the **significant facts** in support of their contentions” (emphasis added). In turn, § 102.64(a) provides that “it shall be the duty of the hearing officer to inquire **fully into all matters and issues necessary to obtain a full and complete record**” (emphasis added). Section 102.66(c) further provides that “[a]pplications for subpoenas may be made **ex parte**” and the “Regional Director or the hearing officer, as the case may be, **shall forthwith** grant the subpoenas requested” (emphasis added). Nothing in § 102.66(c) or, for that matter, any other section of the Board’s Rules and Regulations states that the Hearing Officer is to do anything other than issue the subpoenas promptly, if not immediately, upon request. However, § 102.66(c) indicates, consistent with the language of the statute, that the “[R]egional Director or the Hearing Officer, as the case may be, **shall** revoke the subpoena if, in his opinion, the evidence whose production is required **does not relate to any matter under investigation or in question** in the proceedings...or if for any other reason sufficient in law the subpoena is otherwise invalid”<sup>5</sup> (emphasis added). Section 102.66(c) further states that the “regional

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<sup>5</sup> Section 11(l) provides that “the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required”.

Director or the hearing Officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling.”

During both the *ex parte* discussion as well as the colloquy on the record between Employer counsel and the Hearing Officer (Tr. 338:19-339:2), Employer counsel explained that it had requested the subpoenas in dispute for the purpose of securing testimony from housekeepers, laundry aides, and porters to establish that Vergel de Dios had engaged in pro-union conduct and directed members of his staff to “cover up” that he had done so. Under the statute as well as the Board’s Rules and Regulations, the Hearing Officer was obligated to issue the requested subpoenas. The face of the statute and regulations indicate that the Hearing Officer had no discretion to deny their issuance. Assuming, *arguendo*, that there is some limiting principle and that the Hearing Officer could apply the standard for revoking subpoenas in denying their issuance in the first instance, there was no basis for refusing to issue the requested subpoenas since the Employer sought them in connection with a matter directly in question in the proceeding, specifically, whether Vergel de Dios had engaged in pro-union conduct and taken steps to prevent the Employer from ascertaining that he had done so. Moreover, in view of the Hearing Officer’s expression of concern that the hearing had become time-consuming and that the Board’s resources were being unnecessarily exhausted, it was that much more incumbent upon him to issue the subpoenas when requested so that the Employer could promptly serve the subpoenas, call the subpoenaed witnesses, and elicit their testimony. Given that the colloquy took place early in the afternoon on Friday, May 11 and the weekend was afoot, had the Hearing Officer assessed the situation properly he would have realized that immediate issuance of the requested subpoenas would have enabled the Employer to serve them over the weekend or first

thing Monday morning (outside the oversight of Vergel de Dios) and call the subpoenaed employees as soon as Monday morning.

**II. The Deficiencies In The Report As Well As The Conduct Of The Hearing Necessitate That The Board Reject The Hearing Officer's Recommendations, Sustain The Objections, And Order A Rerun Election.**

The Hearing Officer's ostensible basis for refusing to issue the subpoenas was that the Employer had not yet produced direct, non-hearsay evidence of pro-union supervisory conduct. He reasoned that in the absence of such evidence he was not obligated to issue the requested subpoenas because the Employer had been obligated to come to the hearing with direct, non-hearsay evidence in hand and instead of having done so had embarked upon a fishing expedition in a search for such evidence. Accordingly, the Hearing Officer concluded that he would not issue additional subpoenas to the Employer that would enable it to continue fishing, dismissed such witnesses as the Employer had called for whom the Employer could not make an offer of proof of direct, non-hearsay evidence, and directed the Employer to produce such witnesses as it represented could provide such testimony on Monday morning.

The Hearing Officer's rationale for denying the requested subpoenas is plagued by numerous defects. Of course, at the outset, it bears emphasis that the Report does not address this matter since nowhere does the Report discuss, let alone even reference, the Employer's request for the subpoenas, the colloquy that ensued (both off and on the record), and the Hearing Officer's denial of that request. That silence is deafening. It suggests that upon reflection and in authoring the Report, the Hearing Officer recognized and came to appreciate that his denial of the subpoenas ran afoul of the statute and regulations. Rather than acknowledge the issue, the Report rewrites history as if this episode never occurred. On its face, then, the Report completely fails to address and explain the denial of the requested subpoenas. Manipulation of

this kind and magnitude is a mode of administrative adjudication that the Board should refuse to condone and in and of itself is a basis for overturning the Report.

If, *arguendo*, the Employer applies the Report's analysis to the subpoena issue, the Hearing Officer's rationale for denying the requested subpoenas is, as he stated at the hearing, the Employer's failure to introduce into the record direct, non-hearsay evidence of supervisory pro-union conduct. The Employer has several responses that reveal the deficiency of that rationale as a basis for refusing to issue the requested subpoenas.

First, as noted earlier, it is inherently difficult for a company to uncover evidence of supervisory pro-union conduct. *E.g., Anchor Inns, Inc. v. NLRB*, 644 F.2d 292, 297 (3d Cir. 1981) (in a case involving supervisory pro-union conduct, court remarked that "there are a variety of circumstances that would render the production of firsthand accounts of unlawful activity extremely difficult, if not impossible"). The supervisor is reluctant to reveal his breach of duty of loyalty in campaigning on behalf of a union knowing that it could result in his discharge. Subordinates are reluctant to reveal the supervisor's conduct because of a fear of reprisal by the supervisor. Accordingly, there are substantial obstacles to a company eliciting probative testimony until it has witnesses under oath assuming, *arguendo*, that at least some persons who are reluctant or outright unwilling to be forthright about such a matter nonetheless testify truthfully once they are on a witness stand. The hostility and conflict that erupted at the hearing in connection with Vergel de Dios' testimony illustrates this point with respect to a supervisor. The Hearing Officer's refusal to issue the requested subpoenas inhibits the Employer's ability to comment fully on this point with respect to a supervisor's subordinates, though the proposition is nonetheless supported by Vergel de Dios' unprompted compulsion to tell Center Administrator Senk and other department managers that his staff "have his back" or

words to that effect and his transparent subsequent denials of having engineered that support. It follows that the Hearing Officer violated the command of the statute and the Board's regulations that he afford the Employer a full opportunity to develop a complete record when he refused to issue the requested subpoenas. In that regard, then, the Report's incantation (at 3) that "[a]ll parties were afforded a full and complete opportunity to...present evidence" is inaccurate and misleading.

Second, the Report is misleading in several respects in terms of its depiction of how the record evolved and, further, fails to afford Employer counsel deference in terms of his litigation strategy and choices. As an initial matter, the Report references "three days of an open record" (at 4), though shortly thereafter it states just somewhat more accurately that the Hearing Officer directed the Employer to present its witnesses with non-hearsay knowledge "after two days of [h]earing". The reality is that after just 1.5 days of hearing, beginning at the lunch break on the second day of hearing and immediately upon resumption of the hearing on that second afternoon, the Hearing Officer

- directed Employer counsel to refrain from calling (and to dismiss despite the presence of one witness right then and there) certain subpoenaed employee witnesses with whom Employer counsel had not spoken because they had exercised their rights under *Johnnie's Poultry* but who the Employer believed would have knowledge of supervisory pro-union conduct because of its understanding that they were integrally involved in the Union's organizing drive, and
- ordered Employer counsel, upon concluding examination of one of the supervisors in issue and another manager, to begin calling only those witnesses it had interviewed who it believed based upon those interviews would provide non-hearsay testimony concerning supervisory pro-union conduct.

The Hearing Officer's orders wrongfully interfered with the Employer's ability to put on and make out its case. The Hearing Officer ostensibly proceeded as he did because of a belief that the Employer's evidentiary presentation was deficient and that it was wasting the Region's

resources. However, his judgment was misplaced in that the Employer was prosecuting objections that it had a reasonable belief that it could prove and was not consuming the Region's resources unnecessarily. That this is the case is shown by the fact that Employer counsel had made the bona fide decision to proceed as follows:

(a) Calling the four supervisors in issue as its first witnesses (supervisors Lewis and Vergel de Dios were the second and third witnesses only because non-party Chase appeared early on the first day of hearing unexpectedly, and supervisors Cordero and Thornton had to depart on the first day of hearing because of other commitments and returned on the second day);

(b) Next eliciting testimony from non-parties (Gogia, Frost, Chase, and one witness who did not appear, former Administrator David Repoli) who it believed had relevant knowledge but it was not positioned to interview or prepare because of pending civil litigation against Repoli, Gogia, and Frost as well as the decision to ban Chase (who is Gogia's niece and an employee of Gogia's firm) from working at the Center;

(c) Thereafter calling as witnesses several employees it understood were active Union supporters who it believed for similar reasons were likely to have relevant knowledge; and

(d) Then calling as witnesses employees who it had interviewed or reasonably believed had non-hearsay knowledge going to the merits of the objections, and only doing so after "locking in" the testimony of the witnesses identified in (a)-(c) above so that they could not change their stories.

In view of the supervisors' denial that they had engaged in the conduct alleged against them and the denial by the three non-parties who appeared that they were involved with the Union, it was unsurprising that at the outset the Employer had adduced limited evidence in support of the objections. However, as noted above, Vergel de Dios' testimony was highly

suspect and he had already been exposed as having “covered up” what he had done when then-Administrator Senk impeached Vergel de Dios’ obfuscation and denial regarding what happened at the department head meeting.<sup>6</sup> The fact that Sajimi denied having had the conversation with Cordero that the Employer alleged was also not surprising but served the purpose of locking in her testimony since night supervisor Langan was expected to testify that she overheard Cordero and Sajimi having that discussion. Finally, Admissions Director Ezky testified that a person who he either could not or would not identify had told him that supervisor Janet Lewis had been involved in solicitation of authorization cards before she had been promoted into a supervisory position. While that testimony could not of itself support the objections, it did provide a foundation for the Employer’s position that despite her denial Lewis had been involved with the Union and that based upon other information it had received it reasonably believed that she had continued to promote the Union after having become a supervisor.

The above makes apparent that the Employer was prosecuting the objections diligently with sensitivity to conservation of the Board’s resources. It also demonstrates that it is unfair and prejudicial for the Hearing Officer to take issue with the substance and integrity of the Employer’s presentation. When, as here, supervisors and their subordinates have incentive to camouflage their conduct, the hurdles that an employer must surmount in putting on its case are

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<sup>6</sup>The Employer had not intended to call Senk to testify at the point in time that it did. However, several employee witnesses and two of the supervisors in issue who the Employer had subpoenaed to appear on the first day of hearing had become fed up waiting to testify and/or had to depart because of other commitments (e.g., other jobs, child care considerations). Responding to the Hearing Officer’s concern that time be expended productively, Employer counsel called Senk before it had intended to do so. It is ironic, to say the least, that the Hearing Officer takes issue with the Employer for exhausting the Region’s resources unnecessarily in view of how the Employer, seeking to minimize “down” time and ensure that the time of the Hearing Officer and parties was used efficiently, ended up having to try to manage a queue of witnesses, suffered the departure of some of those witnesses, and then called the witness it intended to have testify last in deference to the Hearing Officer’s focus on efficient time use.

considerable. Indeed, compliance with *Johnnie's Poultry* makes the employer's task particularly difficult since employees who have been identified as either persons with knowledge or participants are often unwilling to interview or prepare for hearing. That silence is compounded in a case such as this precisely because the supervisors in issue are not forthcoming.

While the Hearing Officer might answer that the Employer was obligated to make out its case notwithstanding these hurdles, the above explanation and record herein demonstrate that the Employer had a reasonable basis for believing that the supervisors in issue were engaged in pro-union conduct and that Vergel de Dios in particular had communicated to his staff, with whom he wielded great influence, that they should support and vote for the Union. The evidence that the Employer developed suggesting that Vergel de Dios sought to suppress truthful responses by his staff to inquiries by the Employer as to what he had done during the election campaign further fortifies the Employer's position and underscores that the Hearing Officer, rather than denying the Employer the requested subpoenas, ought to have granted them to the Employer without forcing the Employer to reveal its purpose in seeking them. *See Anchor Inns*, 644 F.2d at 298, which notes that the "Board may properly insist on competent evidence at an evidentiary hearing, when its subpoena power is placed at the parties' disposal". Here, of course, the converse is true in that the Hearing Officer's refusal to issue subpoenas that the Employer had demonstrated good cause for requesting should have precluded the Hearing Officer from critiquing the Employer's evidence as harshly and prematurely as he did. It follows that the Hearing Officer's conclusions regarding the Employer's evidentiary presentation were premature and arbitrary and the Board should reject his recommendation that the Board overrule Objections 1 and 2.

The third deficiency in the Hearing Officer's rationale emanates out of (a) the Employer's decision not to subpoena the housekeepers, laundry aides, and porters prior to the hearing on the belief that Vergel de Dios was most likely to testify truthfully if his staff was not called as witnesses and (b) its recognition during the hearing, in view of how the record developed, that truthful testimony from members of Vergel de Dios' staff was necessary. Vergel de Dios' testimony made clear that the Employer correctly assessed that he was monitoring whether the Employer had subpoenaed his subordinates. The Employer anticipated that Vergel de Dios would become extremely defensive if he believed that his staff had been subpoenaed to serve as a "check" on his testimony. As a result, before the hearing it made the strategic judgment that it should subpoena just Vergel de Dios and no one that he supervised.

Once the hearing began and it became clear that Vergel de Dios was not testifying candidly and, further, that he had taken obstructionist steps with respect to his staff, the Employer necessarily had to secure testimony of his staff. Doing so would maximize the Employer's opportunity to make out Objection 2 especially in view of Vergel de Dios' begrudging admission late in his examination that he conveyed other than the Employer's "vote no" message to at least two employees. Issuance of the requested subpoenas would enable the Employer to establish the extent to which Vergel de Dios' reluctant and belated admissions, on the heels of his previous lies, failed to tell the entire story. It follows that the Hearing Officer was horribly premature in concluding that the Employer's presentation was deficient one and one-half days into the hearing on an unfolding record that indicated that Vergel de Dios had urged his employees to support and vote for the Union (and possibly had been involved with authorization cards).

### III. A Rerun Election Is Also Necessary Since The Employer's Due Process Rights Were Violated.

The Hearing Officer's refusal to issue the requested subpoenas not only violated the statute and the Board's regulations but also infringed upon the Employer's right to due process under the Fifth Amendment to the United States Constitution. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands", *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), "in order to minimize the risk of error". *Knight et al. v. Intl Longshoremen's Assn.*, 457 F.3d 331, 340 (3d Cir. 2006), *quoting Tillman v. Lebanon County Corr. Facility*, 221 F.3d 410, 421 (3d Cir. 2000)(quotation marks and punctuation omitted). Court decisions point out that the Board reaches erroneous legal conclusions when, as happened here because the Hearing Officer refused to issue the requested subpoenas, facts are evaluated "without sufficient inquiry into the surrounding circumstances" and "without viewing those facts cumulatively". *E.g., NLRB v. Smith Industries*, 403 F.2d 889, 895 (5<sup>th</sup> Cir. 1968). Borrowing language from other decisions, that same court commented that the Board cannot "**shut off** a party's right to produce evidence or conduct cross-examination material to the issues...." 403 F.2d at 895-96 (emphasis added), *citing NLRB v. Indiana & Mich. Elec. Co.*, 318 U.S. 9, 28 (1943). *See also NLRB v. Mrs. Weaver's Salads*, 439 F.2d 1116, 1117-1118 (6<sup>th</sup> Cir. 1971)(court refuses to enforce Board order, finding Board's unwillingness to permit an employer an additional week of time to submit evidence in support of objections arbitrary and capricious).

Ultimately, due process is violated when there is a sense that "just treatment" has been absent. *Smith Industries*, 403 F.2d at 896, *quoting Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951)(Frankfurter concurring). *See Malave v. Holder*, 610 F.3d 483, 488 (7<sup>th</sup> Cir. 2010), and *Cuellar v. Texas Employment Comm. et al.*, 825 F.2d 930, 938 (5<sup>th</sup> Cir. 1987), where courts interpreting other statutes held that due process is violated when an

administrative agency declines to issue a subpoena or fails to make a subpoena available. Additionally, due process of law necessitates “impartiality, *i.e.*, open mindedness of the trial body”. *Knight, quoting Falcone v. Dantine*, 420 F.2d 1157, 1166 (3d Cir. 1969). The Board itself has underscored the axiom that “[d]ue process is a fundamental right, which we are obligated to protect”. *Factor Sales, Inc.*, 347 NLRB 747, 748 n. 7 (2006).

In the instant proceeding, the Hearing Officer denied the Employer due process of law by failing to extend procedural protections necessary to minimize the risk of error in deciding whether supervisory pro-union conduct took place. Assuming, *arguendo*, that after one and one-half days of hearing the Employer had not elicited any non-hearsay testimony in direct support of the objections, the fact remains that it had established a basis for believing that Vergel de Dios had campaigned his staff to support and vote for the Union and had attempted to obstruct efforts by the Employer to gather evidence of his conduct. The Hearing Officer’s refusal to issue subpoenas that the Employer required to secure non-hearsay testimony to prove these facts, along with the Hearing Officer’s closed-mindedness to the points that the Employer raised justifying why it should be permitted to do so, was a denial of due process. When, as here, the Hearing Officer violated the statute and Board regulations in refusing the requested subpoenas and, further, the Employer was prejudiced by that denial, due process has been infringed.

Despite the arguments the Employer raised in support of its request for the subpoenas, which the Hearing Officer forced the Employer to make on the record and in the Union’s presence notwithstanding its right by statute and regulation to do so *ex parte*, those arguments fell on deaf ears. The Hearing Officer reflexively insisted that on the next day of hearing the Employer was to produce witnesses it had interviewed who could provide non-hearsay testimony. However, the Employer’s strategic judgment was that it should subpoena the

environmental services staff to whom Vergel de Dios had made comments regarding the Union and present their testimony before doing anything further in order to make as complete a record as possible with respect to what Vergel de Dios had said and done both during the campaign as well as after with respect to the “cover up” he had engineered. The Hearing Officer’s inflexibility and parochial view of how the case should proceed, completely ignoring the Employer’s reasoned pleas, are hallmarks of the absence of due process and the basis for the Board to reject the Report’s recommendation that it overrule Objections 1 and 2.

#### **IV. The Appropriate Remedy Here Is An Order Directing A Rerun Election.**

The Employer declined to present any further witnesses or otherwise proceed with the hearing because the Hearing Officer’s heinous rulings--which violated the statute, the Board’s regulations, and the Employer’s due process rights--effectively preclude the Employer from proving that Vergel de Dios engaged in pro-union conduct. The opportunity to serve members of the staff that reported to Vergel de Dios with subpoenas, without Vergel de Dios knowing that it was doing so, was critical to the Employer’s success in securing truthful testimony unencumbered by further Vergel de Dios interference. When the Hearing Officer refused the Employer’s request, that opportunity was irreparably and irrevocably lost. During the hearing, the Employer represented to the Hearing Officer that there was a campaign of intimidation at the Center directed against employees who cooperated with the Employer. Significantly, when the Employer sought to elicit evidence to support this point, the Hearing Officer sustained the Union’s objections and barred it from doing so, thereby preventing the Employer from making a record establishing such obstruction by the Union or employees who supported the Union. The Employer nonetheless decided that without the subpoenas it had requested it should not expose employees who were amenable to testifying on its behalf to harassment and other negative treatment for testifying truthfully about supervisory pro-Union conduct.

The Employer does not see how the Board can restore the status quo ante even if it rejects the Hearing Officer's recommendations, orders resumption of the hearing, and directs issuance of the subpoenas. The Employer cannot duplicate the circumstance that existed on May 11 when it was positioned, over a weekend and at latest the following Monday morning, to serve the subpoenas outside the scrutiny of Vergel de Dios and call housekeepers, porters, and laundry aides as witnesses without Vergel de Dios having opportunity once again to influence (control) what they say. The only way the Board can place the Employer in the position it was in before the Hearing Officer erred so egregiously is to order a new election. Although such a remedy is unconventional, it is not unprecedented, *D&N Delivery Corp.*, 201 NLRB 277, 278 (1973)(when there has been a breach of the Board's Rules and Regulations that "may create the appearance that the Board has prejudged the issues", the Board "shall not attempt to review [the] disposition" on the merits "but shall vacate the election results and direct the holding of a new election"). An order directing a new election would place the Employer in the position it would have been in had the Hearing Officer issued the subpoenas when they were requested, which would have afforded the Employer them the opportunity to subpoena Vergel de Dios' staff and adduce testimony from them about Vergel de Dios' conduct without Vergel de Dios becoming aware of and interfering with the Employer's plan. Because of the Hearing Officer's egregious misjudgment, the Board cannot restore those conditions. Accordingly, the Employer respectfully submits that the Board should reject the Hearing Officer's recommendation that the Board overrule Objections 1 and 2 and, instead, sustain them and order a new election.

## CONCLUSION

For the reasons set forth herein, and on the basis of the accompanying Exceptions, the Employer respectfully submits that the Board should reject the Hearing Officer's recommendations, sustain Objection Nos. 1 and 2, and order a rerun election.

Respectfully submitted,

s/Jedd Mendelson

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Dated: June 26, 2012

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

<b>800 RIVER ROAD OPERATING COMPANY, LLC d/b/a WOODCREST HEALTH CARE CENTER</b>  <b>Employer</b>	<b>NLRB Case No: 22-RC-073078</b>
<b>and</b>  <b>1199 SEIU, UNITED HEALTHCARE WORKERS EAST</b>  <b>Petitioner</b>	

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 26th day of June 2012, the Employer's Brief in Support of Exceptions were served on the following via electronic filing:

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